

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

12 ANTONIO ALVARADO,) No. C 08-02423 JF (PR)
13 Petitioner,) ORDER DENYING PETITION FOR
14 vs.) WRIT OF HABEAS CORPUS
15 B. CURRY, Warden,)
16 Respondent.)
17 _____)

19 Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus
20 pursuant to 28 U.S.C. § 2254, challenging the decision of the Board of Prison Terms (“the
21 Board”) denying him parole. The Court found that the petition stated cognizable claims
22 and ordered Respondent to show cause why the petition should not be granted.
23 Respondent filed an answer addressing the merits of the petition, and Petitioner filed a
24 traverse. Having reviewed the papers and the underlying record, the Court concludes that
25 Petitioner is not entitled to relief based on the claims presented and will deny the petition.

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BACKGROUND

On September 13, 1979, Petitioner was sentenced to a term of twenty-seven years-to-life in state prison after his conviction for first degree murder in the Santa Clara Superior Court. Petitioner challenges the Board's decision denying him parole following his May 31, 2007 parole suitability hearing. Petitioner filed habeas petitions in the state superior, appellate, and supreme courts, all of which were denied as of March 12, 2008. Petitioner filed the instant federal petition on May 12, 2008.

DISCUSSION

I. Standard of Review

This Court will entertain a petition for a writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). The petition may not be granted with respect to any claim adjudicated on the merits in state court unless the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d).

“Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts.” Williams (Terry) v. Taylor, 529 U.S. 362, 412-413 (2000). “Under the ‘reasonable application clause,’ a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Id. at 413. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied

1 clearly established federal law erroneously or incorrectly. Rather, that application must
 2 also be unreasonable.” *Id.* at 411.

3 “[A] federal habeas court making the ‘unreasonable application’ inquiry should
 4 ask whether the state court’s application of clearly established federal law was
 5 ‘objectively unreasonable.’” *Id.* at 409. In examining whether the state court decision
 6 was objectively unreasonable, the inquiry may require analysis of the state court’s method
 7 as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003). The
 8 standard for “objectively unreasonable” is not “clear error” because “[t]hese two
 9 standards . . . are not the same. The gloss of error fails to give proper deference to state
 10 courts by conflating error (even clear error) with unreasonableness.” Lockyer v.
Andrade, 538 U.S. 63, 75 (2003).

12 A federal habeas court may grant the writ if it concludes that the state court’s
 13 adjudication of the claim “results in a decision that was based on an unreasonable
 14 determination of the facts in light of the evidence presented in the State court
 15 proceeding.” 28 U.S.C. § 2254(d)(2). The court must presume correct any determination
 16 of a factual issue made by a state court unless the petitioner rebuts the presumption of
 17 correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

18 Where, as here, the highest state court to consider Petitioner’s claims issued a
 19 summary opinion which does not explain the rationale of its decision, federal review
 20 under § 2254(d) is of the last state court opinion to reach the merits. See Ylst v.
Nunnemaker, 501 U.S. 797, 801-06 (1991); Bains v. Cambra, 204 F.3d 964, 970-71, 973-
 22 78 (9th Cir. 2000). In this case, the last state court opinion to address the merits of
 23 Petitioner’s claims is the opinion of the California Superior Court for the County of Santa
 24 Clara. (Pet., Ex. G (In re Antonio A. Alvarado, No. 67828, Nov. 16, 2007).)

25 **II. Legal Claims and Analysis**

26 As grounds for federal habeas relief, Petitioner alleges that: (1) the Board’s
 27 decision to deny parole was arbitrary and not supported by “some evidence” containing
 28 an indicia of reliability; (2) the denial of parole violated Petitioner’s liberty interest right

1 in parole; and (3) the Board violated due process in continuing to rely on unchanging
 2 facts of Petitioner's crime.

3 The Ninth Circuit has determined that a California prisoner with a sentence of a
 4 term of years to life with the possibility of parole has a protected liberty interest in release
 5 on parole and therefore a right to due process in the parole suitability proceedings. See
 6 McQuillion v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002) (citing Board of Pardons v.
 7 Allen, 482 U.S. 369 (1987); Greenholtz v. Inmates of Nebraska Penal & Corr. Complex,
 8 442 U.S. 1 (1979)). See also Irons v. Carey, 505 F.3d 846, 851 (9th Cir.), reh'g and reh'g
 9 en banc denied, 506 F.3d 951 (9th Cir. 2007); Sass v. California Board of Prison Terms,
 10 461 F.3d 1123, 1127-28 (9th Cir. 2006), reh'g and reh'g en banc denied, No. 05-16455
 11 (9th Cir. Feb. 13, 2007); Biggs v. Terhune, 334 F.3d 910, 915-16 (9th Cir. 2003). In
 12 accordance with this circuit's precedent, the Court will review whether the Board's
 13 decision to deny parole comports with due process.

14 A parole board's decision must be supported by "some evidence" to satisfy the
 15 requirements of due process. Sass, 461 F.3d at 1128-29 (adopting "some evidence"
 16 standard for disciplinary hearings outlined in Superintendent v. Hill, 472 U.S. 445, 454-
 17 55 (1985)). The standard of "some evidence" is met if there was some evidence from
 18 which the conclusion of the administrative tribunal may be deduced. See Hill, 472 U.S.
 19 at 455. An examination of the entire record is not required, nor is an independent
 20 assessment of the credibility of witnesses nor weighing of the evidence. Id. The relevant
 21 question is whether there is any evidence in the record that could support the conclusion
 22 reached by the Board. See id. Accordingly, "if the Board's determination of parole
 23 suitability is to satisfy due process there must be some evidence, with some indicia of
 24 reliability, to support the decision." Rosas v. Nielsen, 428 F.3d 1229, 1232 (9th Cir.
 25 2005) (citing McQuillion, 306 F.3d at 904).

26 When assessing whether a state parole board's suitability determination was
 27 supported by "some evidence," the court's analysis is framed by the statutes and
 28 regulations governing parole suitability determinations in the relevant state. Irons, 505

1 F.3d at 850. Accordingly, in California, the court must look to California law to
 2 determine the findings that are necessary to deem a prisoner unsuitable for parole, and
 3 then must review the record in order to determine whether the state court decision
 4 constituted an unreasonable application of the “some evidence” principle. Id.

5 California Code of Regulations, title 15, section 2402(a) provides that “[t]he panel
 6 shall first determine whether the life prisoner is suitable for release on parole. Regardless
 7 of the length of time served, a life prisoner shall be found unsuitable for and denied
 8 parole if in the judgment of the panel the prisoner will pose an unreasonable risk of
 9 danger to society if released from prison.” Cal. Code of Regs., tit. 15, § 2402(a). The
 10 regulations direct the Board to consider “all relevant, reliable information available.”
 11 Cal. Code of Regs., tit. 15, § 2402(b). Further, the regulations enumerate various
 12 circumstances tending to indicate whether or not an inmate is suitable for parole. Cal.
 13 Code of Regs., tit. 15, § 2402(c)-(d).¹

14 Recently, the Ninth Circuit reheard en banc the panel decision in Hayward v.
 15 Marshall, 512 F.3d 536 (9th Cir. 2008), reh’g en banc granted, 527 F.3d 797 (9th. Cir.
 16 2008), which presented a state prisoner’s due process habeas challenge to the denial of
 17 parole. The panel opinion concluded that the gravity of the commitment offense had no
 18 predictive value regarding the petitioner’s suitability for parole and held that the
 19 governor’s reversal of parole was not supported by some evidence and resulted in a due
 20 process violation. 512 F.3d at 546-47. The Ninth Circuit has not yet issued an en banc

21
 22 ¹ The circumstances tending to show an inmate’s unsuitability are: (1) the
 23 commitment offense was committed in an “especially heinous, atrocious or cruel
 24 manner;” (2) previous record of violence; (3) unstable social history; (4) sadistic sexual
 25 offenses; (5) psychological factors such as a “lengthy history of severe mental problems
 26 related to the offense;” and (6) prison misconduct. Cal. Code of Regs., tit. 15, § 2402(c).
 27 The circumstances tending to show suitability are: (1) no juvenile record; (2) stable social
 28 history; (3) signs of remorse; (4) commitment offense was committed as a result of stress
 which built up over time; (5) Battered Woman Syndrome; (6) lack of criminal history; (7)
 age is such that it reduces the possibility of recidivism; (8) plans for future including
 development of marketable skills; and (9) institutional activities that indicate ability to
 function within the law. Cal. Code of Regs., tit., 15 § 2402(d).

1 decision in Hayward.

2 Unless or until the en banc Ninth Circuit court overrules the holdings in Biggs,
 3 Sass, and Irons, it remains the law in this circuit that a prisoner's right to due process is
 4 satisfied if some evidence supports the Board's parole suitability decision. Sass, 461 F.3d
 5 at 1128-29. The Ninth Circuit has also held that the Board may rely on "immutable"
 6 events, such as the nature of the conviction offense and pre-conviction criminality, to find
 7 that the prisoner is not currently suitable for parole. Id. at 1129. However, over time,
 8 because the commitment offense and pre-conviction behavior become less reliable
 9 predictors of danger to society, repeated denial of parole based solely on immutable
 10 events, regardless of the extent of rehabilitation during incarceration, could violate due
 11 process at some point after the prisoner serves the minimum term on his sentence. See
 12 Irons, 505 F.3d at 853-54 .

13 The record shows that on May 31, 2007, Petitioner appeared with counsel before
 14 the Board for a parole consideration hearing. (Hearing Transcript ("HT") at 2 (Pet., Ex.
 15 A.)) The Board's decision to deny parole in this case was based upon its review of the
 16 nature of the commitment offense, Petitioner's prior criminal and social history, and
 17 behavior and programming during imprisonment. (Id. at 7.) The Board concluded that
 18 Petitioner was "not yet suitable for parole and would pose an unreasonable risk of danger
 19 to society or a threat to public safety if released from prison." (Id. at 69.)

20 The Board first considered Petitioner's criminal history. The Board found that
 21 Petitioner's commitment offense had been committed "in an especially cruel and callous
 22 manner in that [Petitioner] stabbed [the victim] with a butcher knife, then chased [the
 23 victim], inflicting the fatal stab wound in the parking lot of an apartment complex,
 24 piercing [the victim's] chest and pulmonary artery." (Id. at 69.) The Board also found
 25 that Petitioner had shot and killed [another victim] in another offense in a "dispassionate
 26 and calculated matter," using a loaded 22-caliber pistol. (Id. at 70.) The Board explained
 27 that "[p]ublic safety was at risk in both... crimes," and yet Petitioner had shown "precious
 28 little insight to no insight at all" into these crimes, as evidenced by his inaccurate

1 description of his crimes at a previous parole hearing and refusal to discuss the crimes at
 2 his 2007 parole hearing. (Id. at 80.) The Board noted that Petitioner’s “massive history
 3 of violations,” which began from a very young age, included “weapons offenses, assaults,
 4 prior criminality, including burglaries, property offenses, drugs, destruction of property,
 5 crimes against police officers,” and that Petitioner’s record included “juvenile parole,
 6 adult probation, juvenile probation... county jail time,” and “possession of narcotics
 7 charges, property crimes, driving under the influence, under the influence crimes and
 8 assault crimes.” (Id. at 70-71.) Petitioner’s criminal history and record impacted his
 9 psychological report, in which the psychologist assessed Petitioner as being “in the high
 10 range in terms of his likelihood to commit future violent acts when compared to other
 11 inmates with similar crimes,” based on factors such as Petitioner’s age (32) when he
 12 committed the crime, his criminal history, “unstable relationships... [and] employment,”
 13 history of substance abuse, and previous failures when under supervision. (Id. at 73-74.)

14 In addition to Petitioner’s criminal history, the Board also considered Petitioner’s
 15 efforts to rehabilitate himself. The Board noted that Petitioner attended Narcotics
 16 Anonymous (“NA”) and Alcoholics Anonymous (“AA”), but found that he had only been
 17 sporadically involved in the two groups and had not internalized the steps needed for
 18 effectively dealing with substance abuse. (Id. at 72.) The Board also found that
 19 Petitioner’s parole plans “need[ed] to be... reinforced... and planned,” especially in terms
 20 of finding a reentry program and obtaining a job offer. (Id. at 74.)

21 The Board acknowledged the presence of several factors tending to show
 22 suitability: 1) lack of disciplinary actions since 1993 (id. at 72); 2) participation in
 23 volunteer activities (id.); 3) some participation in NA and AA (id.); and 4) development
 24 of machine shop skills (id. at 74.). However, the Board concluded that the positive
 25 aspects did not outweigh the factors of unsuitability and denied parole for four years. (Id.
 26 at 85.)

27 In its order denying habeas relief, the state superior court stated in a brief opinion
 28 that “[w]hile the Board may have committed error in failing to explain why it categorized

1 Petitioner's life offense [sic] exceptional, the Board's reliance on Petitioner [sic]
 2 numerous other crimes presently still supports a parole denial." (Pet., Ex. G.)

3 Petitioner claims that the Board's decision denying him parole was arbitrary and
 4 not supported by "some evidence" containing an indicia of reliability. (Id. at 5-8.).
 5 Petitioner argues that the Board relied only on improper evidence, i.e., the unchanging
 6 facts of his original crime. (Id., Ex. G.) This claim is without merit. The state superior
 7 court noted explicitly that it was not relying on the Board's evaluation of Petitioner's
 8 "lifetime offense," i.e. the commitment offense, in upholding the denial. (Id.) The state
 9 court found that the Board properly relied on evidence of Petitioner's other crimes in
 10 denying parole. (Id.) Petitioner does not challenge the reliability of the evidence cited by
 11 the Board in discussing his criminal history prior to his commitment offense. Therefore,
 12 the state superior court properly found that there was "some evidence" to support the
 13 Board's decision.

14 Petitioner also claims that the Board violated his due process rights in continuing
 15 to rely on unchanging facts of Petitioner's crime, even in the face of his rehabilitation.
 16 (Pet. at 16-29.) Although Respondent points out that there is no Supreme Court precedent
 17 prohibiting a parole board from relying on the unchanging facts of a prisoner's crime,
 18 (Resp't at 7), the Ninth Circuit has cautioned that where the prisoner has served the
 19 minimum sentence and demonstrated "substantial evidence" of rehabilitation, reliance on
 20 unchanging facts could violate due process. Irons, 505 F.3d at 853-54. However, even
 21 assuming that the Board may not rely on unchanging facts, the Board's decision in this
 22 case still comports with the requirements of due process, because its decision to deny
 23 parole was based on mutable as well as immutable facts. Specifically, the Board cited
 24 not only Petitioner's prior convictions but also his failure to show remorse for his
 25 commitment offenses, fully address his substance abuse issues, and develop more
 26 substantive post-parole plans. (HT at 72, 74, 80, 82-83.) Accordingly, it cannot be said
 27 that Petitioner has demonstrated "substantial evidence" of rehabilitation such that denial
 28 of parole would raise due process concerns. Irons, 505 F.3d at 853-54.

This Court concludes that Petitioner's due process rights were not violated by the Board's decision to deny parole. Accordingly, the state courts' decisions were not contrary to, or an unreasonable application of, clearly established Supreme Court precedent, nor were they based on an unreasonable determination of the facts in light of the evidence presented. See 28 U.S.C. § 2254(d)(1), (2).

CONCLUSION

The Court concludes that Petitioner has failed to show any violation of his federal constitutional rights in the underlying state court proceedings and parole hearing. Accordingly, the petition for writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Dated: 12/11/09


JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

ANTONIO ALVARADO,

Case Number: CV08-02423 JF

Petitioner,

CERTIFICATE OF SERVICE

v.

BEN CURRY, Warden,

Respondent.

/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 12/22/09, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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PO Box 8101
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Dated: 12/22/09

Richard W. Wieking, Clerk